



REPUBLIC OF SOUTH AFRICA

Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG**

CASE NO:J 482/15

In the matter between:

SIPHIWO NDUNYANA

Applicant

and

**THE SOUTH AFRICAN MUNICIPAL
WORKERS UNION (“SAMWU”)**

Respondent

Heard: 12 March 2015

Delivered: 12 March 2015

Summary: (Urgent interdict – notice to amend)

JUDGMENT

LAGRANGE, J

Introduction

[1] On 5 March 2015, the applicant applied on an urgent basis for the upliftment of his suspension which commenced on 19 December 2014,

pending the final determination of a dispute about the unfair nature of his suspension in terms of section 186 (2) (b) of the Labour Relations Act, 66 of 1995 (' the LRA') by the CCMA. The relief sought in the application was essentially orders permitting him to resume his duties as the Provincial Secretary of the respondent in the Eastern Cape and to restrain the respondent from undertaking any disciplinary proceedings against them pending the outcome of the suspension dispute.

- [2] In his founding affidavit, the applicant also mentions that he did not receive his salary as normal for February 2015. He also states that he had learnt by 15 February 2015 of the dismissal of four of his colleagues who had also been suspended in similar circumstances and anticipated that his own dismissal was imminent.
- [3] In the respondent's answering affidavit filed on 11 March 2015, the respondent claims that in fact the applicant was already dismissed by it on 11 February 2015 and attaches a letter of the same date advising the applicant of his summary dismissal. The respondent does not make any averment how the applicant was advised of his dismissal in the answering affidavit. In reply, the applicant says that he never received that termination letter and suggests that it was concocted to persuade the Court that the dispute about his suspension had been superseded by his dismissal and that consequently any relief the Court might order relating to his suspension would be pointless.
- [4] In response to the allegation that he had been dismissed, the applicant filed an amended notice of motion the day before the hearing of the application in which he seeks further interim relief in the form of a declaratory order that his dismissal be declared invalid and of no force and effect and compelling the respondent to reinstate him. The basis on which he argues that his dismissal is invalid is that the respondent's code of employment requires one month's notice to be given to him of the termination of his contract. Accordingly, he seeks to insist that he is entitled to repudiate the termination in breach of that obligation and to insist on specific performance of the respondent's contractual duty not to

dismiss him without notice. The provision he refers to is clause 2.5 of the respondent's Disciplinary Procedure, which reads:

"Dismissal is the ultimate sanction and is with one month's pay in lieu of notice."

- [5] The respondent argues that the additional relief sought in the amended notice of motion in response to its claim that it had dismissed the applicant essentially introduces an additional cause of action on one day's notice. Consequently, respondent's counsel, *Mr Venter*, submitted that the amendment could not be entertained on such short notice, in the same proceedings that were initiated on 5 March 2013. The applicant's counsel, *Mr Alli*, argued that the amendment was necessitated by the revelation in the respondent's answering affidavit that it claimed to have dismissed the applicant: unless the additional relief was included, the other relief pertaining to the applicant's suspension would be meaningless. He also contended in effect that even if the applicant was now aware of the respondent's decision to dismiss him, that fact should not stand in the way of him proceeding with his original application if that dismissal itself was unlawful for want of payment of one month's salary in view of the notice.
- [6] It is common cause that the applicant's alleged unfair suspension dispute will be considered by the CCMA a week from today on 19 March 2015.
- [7] I will assume for the moment that the Court should entertain the amended application declaring the applicant's dismissal invalid pending the outcome of the CCMA proceedings, on the basis that he had been dismissed without being paid one month's remuneration in view of notice and that the payment of such remuneration is indeed a condition precedent for the valid termination of his employment by the respondent. Even if that is the case, the Court could, at the very best for the applicant, order the respondent to reinstate him until such time as that condition had been complied with. That would not ensure a situation in which his return to work on the simultaneous upliftment of his suspension is realised. The most material possible consequence of his dismissal being declared invalid would be that, it might result in him being entitled to remuneration from the time he was purportedly dismissed until he is dismissed on paid notice. That is a

claim that could be determined in the ordinary course after the respondent had been put on terms to restore his employment until such time as it is validly terminated.

- [8] What this illustrates is that an order invalidating the applicant's dismissal, even if it was appropriate as a matter of urgency for the Court to determine, would not necessarily form the basis for any meaningful guarantee that a simultaneous order lifting his suspension would have any lasting effect.
- [9] In any event, the new relief the applicant seeks essentially is based on a fresh cause of action that should be fully ventilated. Even though the applicant contends that the respondent failed to prove that the applicant received the notice of his dismissal on 11 February 2015, the respondent has not been given an opportunity to address the applicant's contention that he never received it, nor has it been given the opportunity to respond to the claim that the applicant's purported dismissal in the absence of payment of one month's remuneration in view of notice renders the dismissal invalid and unlawful. Likewise, the respondent has not had an opportunity to address what relief would be appropriate in the event that the dismissal was invalid.
- [10] The applicant ought not to have sought to 'piggyback' his application for interim relief invalidating his dismissal on the original application to uplift his suspension, even if the success of the original application is now contingent on the outcome of an application to invalidate his dismissal. He ought rather to have asked the Court to postpone the hearing of the original application pending the determination of a fresh application, on reasonable notice to the respondent, to invalidate the dismissal.
- [11] In the circumstances, the amended application for additional relief relating to the validity of the applicant's dismissal must be struck off the roll on grounds of urgency as it is brought on insufficient notice. The original application must fail on the basis that an order uplifting the applicant's suspension is meaningless given the fact that he has been dismissed, whether the dismissal is lawful or not and whether or not he received a

notice of that dismissal in February 2015 or only when the answering affidavit of the respondent was served on 11 March 2015.

- [12] In view of the genuine uncertainty about whether or not the applicant knew or ought to have known that he was dismissed before 11 March 2015, I believe it would be inappropriate to make any cost order.

Order

- [13] The application to amend the applicant's notice of motion to include additional relief declaring his dismissal invalid and reinstating his employment is struck off on grounds of lack of urgency.

- [14] The original application filed on 5 March 2015 is dismissed.

- [15] No order is made as to costs



R LAGRANGE, J
Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: N Alli instructed by Baqwana Burns

For the First Respondent: R Venter instructed by Maenetja Attorneys

LABOUR COURT